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entitled to a forum to review whether the basis for termination constitutes gross misconduct or malfeasance.

2. The order entered by the Personnel Appeals Board granting WSU's motion for summary judgment is reversed.
3. This matter is remanded to the Personnel Appeals Board for further proceedings consistent with the Court's oral ruling.

1.4 Appellant filed a Motion for Appointment of Hearing Examiner on March 28, 2002, on which the Board heard oral argument April 29, 2002.

1.5 Respondent filed a renewed Motion for Summary Judgment on April 15, 2002, on which the Board heard oral argument May 13, 2002.

1.6 **Appearances.** Appellant was represented by Timothy Esser, Attorney at Law, of Nuxoll, Libey, Ensley, Esser and Nelson. Donna J. Stambaugh, Assistant Attorney General, represented Respondent Washington State University (WSU).

1.7 **Documents Considered.** The Board considered the entire appeal file, including the following documents filed after remand from superior court:

- (a) Motion for Appointment of Hearing Examiner, filed March 28, 2002;
- (b) Respondent's Motion for Summary Judgment and Affidavit of Donna J. Stambaugh, with attachments, filed April 15, 2002;
- (c) Affidavit of Lawren Harper in Response to WSU's Most Recent Motion for Summary Judgment, with exhibits, filed May 1, 2002; and
- (d) Respondent's Reply Memorandum in Support of Motion for Summary Judgment, filed May 9, 2002.

1.8 The Board enters this order to address the post-remand motions, modifying our previous decision to conclude as a matter of law that the conduct for which Appellant was dismissed from his

1 exempt position does not constitute gross misconduct or malfeasance, and grants Lawren Harper's  
2 appeal.

## 3 4 **II. BACKGROUND**

5 2.1 Appellant was employed at Washington State University (WSU) as a classified employee  
6 beginning in 1984. His position was converted to an exempt administrative professional position in  
7 1993. Appellant's position was thereafter exempt from provisions of the state civil service law and  
8 higher education personnel rules that govern classified employees. Rather, Appellant's exempt  
9 employment was governed by the provisions of the WSU Administrative and Professional  
10 Personnel Handbook (AP Handbook).

11 2.2 At the time of the actions giving rise to this appeal, Appellant was the Associate Manager  
12 for the Wilmer-Davis Dining Center. Appellant was aware of the WSU policy prohibiting smoking  
13 in all WSU buildings, yet Appellant used an unused storage room in the dining center for a smoking  
14 room. Appellant also allowed other staff members to use this room for smoking.  
15

16 2.3 Appellant was aware of WSU policy regarding use of meal cards. Employee meal cards  
17 were to be used only by an employee during his or her shift for food purchased prior to  
18 consumption. Appellant used his meal card to purchase meals: for an employee of a private  
19 company; for other employees who forgot their cards; for individuals with invalid accounts; for  
20 parents who did not know that the dining center did not accept cash; and to purchase coffee and  
21 cookies for custodial staff who returned silverware and dishes to the dining center. In addition,  
22 Appellant purchased a number of cups of coffee at one time and then returned throughout the day to  
23 consume coffee he had previously purchased. It appeared to other staff that Appellant was drinking  
24 coffee that he did not purchase. Furthermore, Appellant occasionally consumed food before  
25 purchasing it.  
26

1  
2 2.4 Appellant was aware of WSU's policy regarding the use of public relations (PR) cards. PR  
3 cards were intended to be used, in part, to provide relief to disgruntled customers, for staff who  
4 worked overtime, for special meals guests or entertainment, for lost parents, for meals consumed  
5 during meetings and for guests of Dining Services. Appellant kept his PR card in the safe in his  
6 office and on several occasions used his personal meal card for purchases that should have been  
7 made with his PR card.

8  
9 2.5 By letter dated May 9, 2000, Appellant was terminated from his exempt position by Gerald  
10 J. Marczynski, Director of Housing and Dining Services. The letter notified Appellant that he was  
11 terminated for "gross misconduct, malfeasance, inadequate performance of duties, willful violation  
12 of WSU and departmental policies, and violation of the Washington State Ethics law, RCW 42.52."  
13 The letter informed Appellant that pursuant to the AP Handbook, he could file a written appeal of  
14 his termination with the WSU Vice President within 10 working days after the date of the notice of  
15 termination.

16  
17 2.6 A May 18, 2000 letter addressed "To Whom It May Concern", was written by Karen Erp,  
18 Human Resource Professional, in response to Appellant's request to exercise his right of reversion  
19 from Administrative/Professional to Classified Staff. Ms. Erp stated that in accordance with WAC  
20 251-04-040(13), Appellant had no right of reversion because he was terminated for cause.

21  
22 2.7 On May 22, 2000, Appellant filed this appeal with the Personnel Appeals Board alleging a  
23 violation of WAC 251-04-040(13) and RCW 41.06.070. Specifically, Appellant alleged that  
24 Respondent improperly denied him the right to revert to his former classified position following  
25 termination from his exempt position.

1  
2 2.8 On August 17, 2000, the Board issued a Notice of Dismissal for Lack of Jurisdiction based  
3 on Appellant's lack of standing to file an appeal as an exempt employee. On September 11, 2000,  
4 the Board heard oral argument on the matter. The Board concluded that it did have jurisdiction to  
5 determine whether denial of an exempt employee's right of reversion conformed to state civil  
6 service law. The Board ordered that the appeal could go forward as a rule violation appeal on the  
7 sole issue of whether Washington State University violated RCW 41.06.070(3) and/or WAC 251-  
8 04-040(13) when Appellant was dismissed from his exempt position for gross misconduct and  
9 malfeasance and was subsequently denied the right of reversion to a classified position.

10  
11 2.9 RCW 41.06.070(3) states, in relevant part,

12 Any person holding a classified position subject to the provisions of this chapter  
13 shall, when and if such position is subsequently exempted from the application of  
14 this chapter, be afforded the following rights: If such person previously held  
15 permanent status in another classified position, such person shall have a right of  
16 reversion to the highest class of position previously held, or to a position of similar  
17 nature and salary.

18 Any classified employee having civil service status in a classified position who  
19 accepts an appointment in an exempt position shall have the right of reversion to the  
20 highest class of position previously held, or to a position of similar nature and salary.

21 A person occupying an exempt position who is terminated from the position for  
22 gross misconduct or malfeasance does not have the right of reversion to a classified  
23 position as provided for in this section.

24  
25 2.10 WAC 251-04-040(13) states:

26 Any classified employee having civil service status in a classified position who  
accepts an appointment in an exempt position shall have the right of reversion to the  
highest class of position previously held, or to a position of similar nature and salary.  
Application for return to classified service must be made not later than thirty  
calendar days following the conclusion of the exempt appointment. A person  
occupying an exempt position who is terminated from the position for gross  
misconduct or malfeasance does not have the right of reversion to a classified  
position as provided for in this section.

1  
2 2.11 On November 16, 2000, Appellant filed a Motion for Summary Judgment. Appellant  
3 argued that under the doctrine of collateral estoppel or *res judicata* the Board should rule in his  
4 favor because the administrative law judge presiding over Appellant's unemployment hearing  
5 determined that Appellant did not engage in misconduct. In response to Appellant's motion,  
6 Respondent filed a Cross-Motion for Summary Judgment on January 12, 2001. During the  
7 February 28, 2001, hearing on these motions, Appellant conceded that under RCW 50.32.097, the  
8 Board could not use the determination in the unemployment compensation matter. In effect,  
9 Appellant withdrew his motion.

10  
11 2.12 On April 6, 2001, the Board issued an order granting Respondent's motion and denied the  
12 appeal. The Board concluded, in part, that despite the parties urging to examine the underlying  
13 circumstances of Appellant's dismissal and determine whether the conduct cited as the basis for  
14 termination constituted gross misconduct or malfeasance, ". . . such a review would improperly  
15 assert Personnel Appeals Board jurisdiction over an employment relationship that is exempt from  
16 the civil service law." As detailed in the procedural history above, the court reversed the Board on  
17 this point and remanded the appeal for further proceedings consistent with its oral ruling.

### 18 19 **III. MOTION FOR APPOINTMENT OF A HEARING EXAMINER**

20 3.1 Appellant argues that the Board declined to hear his appeal on two previous occasions and  
21 that the unique procedural history of this case requires the assignment of a hearing examiner in the  
22 interest of the appearance of fairness. Further, Appellant argues that any appeal from a hearing  
23 examiner's decision would be limited to determining whether the decision was supported by the  
24 evidence. In addition, Appellant requests that if his motion is denied, Respondent's Motion for  
25 Summary Judgment should be continued.

1  
2 3.2 Respondent argues that any decision of a hearing examiner is appealable to the Board.  
3 Respondent contends that assigning this case to a hearing examiner would only delay the  
4 proceedings because the central issue remanded by the court will be before the Board one way or  
5 another.

6  
7 3.3 The question before the Board is whether a hearing examiner should hear this matter.  
8

9 3.4 The Court's order gives ample direction to the Board to conduct further proceedings  
10 consistent with the Court's oral ruling. The Board has jurisdiction to determine whether the basis  
11 for Appellant's termination from his exempt position constitutes gross misconduct or malfeasance.  
12 Regardless of the procedural history of this case, the Board would have been able to conduct a fair  
13 and unbiased hearing of this appeal, if further hearing was necessary. In recent years, the Board has  
14 assigned only three employee appeals to hearings examiners because a former member was the  
15 appointing authority prior to her appointment to the Board. While circumstances in other appeals  
16 may persuade us to appoint a hearings examiner as permitted under RCW 41.64.080, we are not  
17 compelled to do so in the present case to address the remaining issues of law.  
18

19 3.5 Before the Board had sufficient time to enter a written decision on the Motion for  
20 Appointment of a Hearing Examiner, Appellant filed his response to Respondent's Motion for  
21 Summary Judgment on May 1, 2002. The Board heard argument from both parties on Respondent's  
22 motion on May 13, 2001.

23  
24 **III. MOTION FOR SUMMARY JUDGMENT**  
25  
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1 5.1 Respondent argues that the narrow issue before the Board is whether Appellant engaged in  
2 gross misconduct and/or malfeasance and contends that the Board can make this determination  
3 based on the undisputed facts presented by the institution. Respondent asserts that Appellant  
4 routinely and knowingly violated policy; that his actions were blatant, flagrant, and intentional; and  
5 that his actions were detrimental to the dining center and WSU. Respondent argues that WSU  
6 managers are held to a high standard of conduct and are expected to set an example for staff and  
7 students. Respondent contends that Appellant's actions violated the trust Respondent placed in him  
8 to be honest, to be an example for others, and to effectively carry out his duties in accordance with  
9 policy. Respondent asserts that Appellant misused his position to further his own purposes.  
10 Respondent argues that Appellant acted contrary to the expectations of an associate manager by  
11 repeatedly misusing his meal card and allowing and participating in the use of a storage area as a  
12 smoking room. Respondent contends that Appellant's actions constituted gross misconduct and  
13 malfeasance.

14  
15 5.2 Appellant admits that he used his meal card as alleged by Respondent. Appellant also  
16 admits that he utilized and allowed others to utilize the unused storage area for a smoking room.  
17 However, Appellant contends that his actions did not constitute misconduct and were not in  
18 violation of WSU policies governing use of dining cards. Furthermore, Appellant contends that his  
19 actions did not rise to the level of gross misconduct and did not constitute malfeasance. Appellant  
20 asserts that he was a sixteen-year employee with an excellent employment record but following a  
21 restructuring of management, he began reporting to a different supervisor. Appellant contends that  
22 his termination was the result of a personality conflict between he and his new supervisor.  
23 Appellant argues that the WSU policy regarding meal cards was under discussion, that there was  
24 confusion about use of the cards, that he always used the card in the best interest of WSU, not for  
25 personal gain, and that no one ever told him that his use of the card was wrong. Appellant further  
26



1 argues that he did not "set up" the smoking room and that management was aware of the smoking  
2 room since staff began using the room for that purpose. Appellant contends that because  
3 management tolerated the actions, his behavior cannot be considered a flagrant disregard of policy.  
4 Appellant contends that he did not violate WSU policies; rather he did what he had been doing for  
5 years with the knowledge of his supervisor.

6  
7 5.3 The Personnel Appeals Board may decide an appeal when the documents on file,  
8 depositions and affidavits show there is no genuine issue as to any material fact and the appeal  
9 should be decided or dismissed as a matter of law. WAC 358-30-060(1). Consideration of  
10 dispositive or summary motions under this rule does not dictate that the Board must decide the  
11 appeal in favor of the moving party. All facts and reasonable inferences are to be determined in  
12 favor of the nonmoving party. Hall v. University of Washington, PAB No. 3863-V2 (1995). The  
13 Board's rule on summary motions does not require us, under these circumstances, to either grant the  
14 motion and deny the appeal or deny the motion and proceed to a hearing. Because the central issues  
15 remanded by the Court are questions of law, the Board decides this appeal based on the affidavits  
16 filed and the written and oral argument submitted by counsel.

17  
18 5.4 The questions presented in this appeal are whether Appellant's actions constituted gross  
19 misconduct or malfeasance and whether Washington State University violated RCW 41.06.070(3)  
20 and/or WAC 251-04-040(13) when Appellant was dismissed from his exempt position and denied  
21 the right of reversion to a classified position.

22  
23 5.5 There are no genuine issues of material fact that must be resolved, which would preclude the  
24 Board from deciding the narrow issues presented by Respondent's Motion for Summary Judgment.  
25 Rather, there are sufficient undisputed material facts to determine whether the acts for which  
26

1 Appellant was dismissed from his exempt position amount to gross misconduct or malfeasance.  
2 The Board concludes that an evidentiary hearing under these unique circumstances, given the  
3 lengthy procedural history of this case, would not elicit any additional facts that would influence the  
4 legal conclusions required to decide this appeal.

5  
6 5.6 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry  
7 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
8 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
9 interest or standards of expected behavior.

10  
11 5.7 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to  
12 do, or the performance of an action that ought not to be done, that affects, interrupts or interferes  
13 with the performance of an official duty. Parramore v. Dep't of Social & Health Services, PAB No.  
14 D94-135 (1995), aff'd, Thurston Co. Super. Ct. No. 95-2-03516-4.

15  
16 5.8 Appellant's actions did not constitute gross misconduct or malfeasance. Appellant admits  
17 that he used his meal card in the manner alleged. He also admits that he smoked in the storage area  
18 and also allowed other employees to smoke there. However, based on the undisputed facts and  
19 circumstances presented through the affidavits and Appellant's admissions, we conclude that  
20 Appellant did not exhibit the degree of "willful or wanton disregard of his employer's interests or  
21 standards of expected behavior" to support characterizing these actions as flagrant misbehavior in  
22 the definition of gross misconduct. We further conclude that the primary functions of Washington  
23 State University – to educate students and conduct academic research – were not adversely  
24 impacted by Appellant's actions. We finally conclude that these acts were not illegal and, whether

1 ill advised or not, did not interrupt or interfere with the performance of Appellant's official duties as  
2 manager of the Wilmer-Davis Dining Center.

3  
4 5.9 Appellant's actions may have violated the relevant policies and may have even been a  
5 neglect of duty, two of the causes for which a classified employee may be disciplined or dismissed.  
6 But neither of those causes for dismissal from an exempt position is sufficient to eliminate a former  
7 classified employee's reversion rights. Only those acts or omissions that this Board determines are  
8 gross misconduct or malfeasance can terminate the right of a former classified employee to revert to  
9 the highest class of position previously held, or to a position of similar nature and salary.

10  
11 5.10 RCW 41.06.070(3) and WAC 251-12-040(13) are clear and unambiguous. Because we have  
12 concluded that Appellant's actions did not constitute gross misconduct or malfeasance, he should  
13 have been allowed to exercise his right of reversion to the classified service. Respondent violated  
14 the civil service law and the higher education personnel rules by denying Appellant's request to  
15 revert to the classified service.

16  
17 5.11 The events preceding this appeal occurred more than two years ago. Mr. Harper's appeal  
18 raised important issues of first impression regarding the Board's jurisdiction, which the Court  
19 addressed in its remand order. The Board realizes this decision does not provide clear guidance for  
20 future situations involving exempt employees with reversion rights, other than to reinforce the  
21 principle that each appeal is decided on its unique facts and circumstances.

22  
23 5.12 Based on the foregoing discussion and conclusions, the appeal of Lawren Harper should be  
24 granted.

1 Having reviewed the files and records in this matter and being fully advised in the premises, the  
2 Board enters the following:

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**V. ORDER**

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NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Lawren Harper is granted.  
Effective May 18, 2000, Lawren Harper is reverted to the highest class of position previously held,  
or to a position of similar nature and salary, with restoration of all employee rights and benefits as  
provided by WAC 251-12-260.

9

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

10

WASHINGTON STATE PERSONNEL APPEALS BOARD

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